IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.09.2005

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

Second Appeal Nos.365 to 367 of 1994

Poyyamozhi ..Appellant in S.A.No.365/1994

Arunachala Padayachi ..Appellant in S.A.No.366/1994

1. Manimozhi Ammal)
)
2. Pugalendi) ..Appellants in S.A.No.367/1994
)
3. Thamilayya)
Third appellant declared
as major as per
order dated 3.3.94 in
C.M.P.Nos.3290 & 3291/94

-Vs-

1. Narayanasami Padayachi
2. Rajakannu
3. Mani ..Respondents in all SA's
(Defendants 1 to 3)

These Second Appeals have been filed under Section 100 C.P.C. against the judgment and the decree dated 29.10.1993 made in A.S.Nos. 28, 30 and 32/93 before the Addl.Sub-Court, Cuddalore, reversing the judgment and the decree dated 22.12.1992 in O.S.Nos. 532, 533 and 531/82 passed by the District Munsif Court, Panruti.

For Appellant : Mr.G.Rajagopalan, Senior Counsel for M/s.G.M.Associates
For Respondents : Mr.G.Kathirvelu

C O M M O N J U D G M E N T

This judgment shall govern the above three second appeals. These second appeals have been filed challenging a common judgment of the Subordinate Judge, Cuddalore, made in A.S.Nos.28/93, 30/93 and 32/93 wherein the judgment of the District Munsif, Cuddalore in O.S.No.531, 532 and 533/82 was reversed.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

2. The appellants before this Cout were the plaintiffs, who filed the said three suits seeking for declaration of title and consequential permanent injunction or in the alternate, recovery of possession from the defendants/respondents herein. On trial, the suits were decreed granting declaration and consequential permanent injunction. Aggrieved defendants took them on appeals wherein the judgment of the trial Cout was reversed and the suits were dismissed. Hence, these three second appeals at the instance of the plaintiffs.

3. As could be seen from the avements in the plaints, the suit property originally belonged to one Chinnammal, wife of Muthulinga Padaiachi. She executed a Will under Ex.A4 on 15.11.62. On her death, the property came to the hands of the fourth defendant and the fourth defendant has executed the sale deeds in favour of the plaintiffs under Exs.A1 and A12 in respect of the properties found in the plaint schedule in O.S.No.531/82 and Ex.A13 is the sale deed executed in respect of the properties found in the plaint schedule in O.S.No.532/82 and Ex.A46 is the sale deed executed in respect of the properties found in the plaint schedule in O.S.No.533/82. Thus, the plaintiffs derived title through the sale deeds executed by the fourth defendant and that they have been in enjoyment of the same. The defendants would adumbrate that they have title to the property. Hence, there arose a necessity for filing the suits.

4. The first defendant contested the suit by filing a written statement while the second and third defendants adopted the same. What was all contended by the first defendant was that the properties originally belonged to the joint family consisting of Govinda Padaiyachi and his four sons; that Muthulinga Padaiyachi, husband of Chinnammal had no independent right to execute any sale deed. Thus, the original sale deeds executed in favour of Chinnammal under Exs.A2 and A3 did not pass on any title and thus, Chinnammal had no right to execute the Will. Added further, the Will alleged to have been executed by Chinnammal was not at all executed by her and there were number of suspicious circumstances attending over the same and further, since Muthulinga Padaiyachi, despite having two wives, had no issues, paid all his affection on the first defendant and treated him as his son and on the death of Muthulinga Padaiyachi, the property was enjoyed not only by Chinnammal but also by the first defendant and on the death of Chinnammal, the property came to the hands of the first defendant and thus, he continued to be the owner and he was in possession of the same and thus, the fourth defendant never became the owner of the properties in question nor had he got the right to execute any sale deed in favour of the plaintiffs and thus, the case of the plaintiffs has to be rejected.

5. The trial Court framed necessary issues and tried the suit. Both sides adduced evidence both oral and documentary and the trial Court answered the issues in favour of the plaintiffs and granted a decree of declaration and consequential permanent injunction. Aggrieved, the defendants took it on appeals and on

https://hcservices.ecourts.gov.in/hcservices/

enquiry, the first appellate forum, rendered a common judgment wherein the judgments of the trial Court were set aside and the suits were dismissed. Hence, these second appeals at the instance of the plaintiffs in the three original suits.

6. The following substantial questions of law were framed by this Court at the time of admission.

> 1. Whether in law the lower Appellate Court is wrong in holding that the suit properties did not belong to Chinnammal, inspite of ex.A2 7 A3 sale deeds in her favour and thereby ignored the statutory abolition of benami transaction?
>
> 2. Whether the lower Appellate Court is right in finding that the decree in O.S.No.993 of 1996 would not operate as resjudicata in the present suit?

7. The Court heard the learned counsel for the appellants and also the respondents.

8. Learned counsel for the appellants interalia would submit that the plaintiffs have purchased the properties under four registered sale deeds marked as Exs. A1, A12, A13 and A46 and those sale deeds were executed by the fourth defendant in whose favour the original owner Chinnammal had executed the Will, Ex.A4. On her death, the Will came into force and the fourth defendant derived title and had executed the sale deeds. In so far as the Will Ex.A4 executed by Chinnammal was concerned, the original of the same could not be produced since the same was filed in the earlier suit between the parties and when the original Will was sent for, it could not be obtained but a communication was received stating that the said original document was destroyed. Under such circumstances, the original Will could not be produced. Whether the will executed by Chinnammal was true, valid or otherwise was the subject matter in the earlier proceedings in which the first defendant was a party to it and he contested on the same lines and the judgment on the said issue has become final and now, the first defendant cannot question the same. Added further learned counsel, as to the contention putforth by the respondents' side that the properties originally belonged to the joint family, there was no evidence at all and it is true that Muthulinga Padaiyachi had executed two sale deeds in favour of his wife and from that time onwards Chinnammal as the owner was in possession and enjoyment and she has executed a Will in favour of the fourth defendant and the fourth defendant has executed four sale deeds in question through which the plaintiffs have claimed title to the properties. The trial Court has marshalled the evidence proper and has granted a decree but the appellate forum has set it aside erroneously. On the evidence adduced by the plaintiffs, they have proved the case and hence, all the three second appeals have got to be allowed.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

9. Contrary to the above contentions, learned counsel for the respondents would submit that the properties in question originally belonged to the joint family consisting of Govinda Padaiyachi and his four sons. The sale deeds alleged to have been executed by Muthulinga Padaiyachi under Exs.A2 and A3, were not valid and apart from that though he was the Kartha of the joint family even the recitals would clearly indicate that there was no reason to execute such sale deeds and thus, the property continued to be the joint family property in the hands of the members of the joint family consisting of the first defendant all along with his brothers including Muthulinga Padaiyachi, the husband of the said Chinnammal and thus, Chinnammal has no right of alienation. Added further learned counsel in so far as the Will executed by Chinnammal was concerned, since she has no right over the property, she could not execute such a Will and even the Will which was executed was not produced in the instant case and the reliance which was placed by the appellants on the judgment rendered by the Civil forum in the earlier proceedings would not bind the parties and it would not constitute res-judicata in so far as the Will was not proved and the plaintiffs who claim title to the property under the Will could not make a claim over the same. Added further learned counsel it was the case where the first defendant has pleaded and proved adverse possession of the property. Under such circumstances, without considering the evidence in the proper perspective, the trial Court has granted the relief and on enquiry, the first appellate Court had set aside the same. Hence, the judgment of the first appellate Court has got to be confirmed and the second appeals have got to be dismissed.

10. The Court paid its full attention on the submissions made and had a thorough scrutiny of the entire materials available.

11. As could be seen above, the plaintiffs have claimed title to the property in all these three suits under four sale deeds namely Exs.A1, A12, A13 and A46. Their case in gist was that the property belonged to the fourth defendant and as the owner of the property, the fourth defendant had executed sale deeds in favour of the plaintiffs in the three suits. The only defendant who contested the suit was the first defendant. The second and the third defendants had no separate defence to offer.

12. It is not in controversy that one Govindasamy Padaiachi had four sons by name Muthulinga Padaiachi, Narayanasamy Padaiachi, Ramar and Muthusamy Padaiyachi. Chinnammal was the wife of Muthulinga Padaiyachi. Muthulinga Padaiyachi has executed two sale deeds in favour of Chinnammal under Exs. A2 and A3 dated 25.1.1941 and 27.3.1943 respectively. The first defendant in the course of cross examination has clearly admitted that no documentary evidence is available to show that the properties belonged to Govinda Padaiyachi. On the date when those sale deeds were executed by Muthulinga Padaiyachi in 1941 and 1943, those documents have come into existence in favour of Chinnammal.

https://hcservices.ecourts.gov.in/hcservices/

Admittedly, the first defendant was a major at that time. It is not the case of the first defendant that he had no knowledge about the sale. Had it been true that Muthulinga Padaiyachi had no right to execute such a sale deed, the first defendant would have challenged the same but has not done so, despite the knowledge of the same. Therefore, the contention putforth by the respondents that the property originally belonged to the joint family consisting of Govinda Padaiyachi and his four sons and continued to remain as such, despite the execution of Exs.A2 and A3 sale deeds by Muthulinga Padiayachi in favour of Chinnammal, has to be discountenanced at this stage.

13. The second contention that Chinnammal had no right to execute such a Will as found under Ex.A4 has got to be discountenanced for the simple reason she derived title under Exs.A2 and A3 in the year 1941 and 1943 itself and thus, she became the owner of the property. So far as Ex.A4, Will was concerned, the case of the plaintiff was that it was executed by Chinnammal in favour of the fourth defendant on 15.11.1962. The first defendant took a specific stand that she had no right to execute a Will. Even assuming that she has executed a Will, such a Will is neither true nor valid because it was surrounded by suspicious circumstances. In the instant case, it is not in dispute that she executed the Will as found under Ex.A4.

14.At this juncture it has to be pointed out that one of the brothers of the first defendant by name Ramar Padaiyachi has already filed O.S.No.993/69 wherein the first defendant and the fourth defendant were parties. It was a suit filed by one Ramar Padaiachi seeking declaration of the property that the property belonged to himself and his brother, the first defendant and the plaint copy of the said suit was marked as Ex.A58 and the written statement filed by the fourth defendant was marked as Ex.B59 and the written statement filed by first defendant herein who has contested the instant suit was marked Ex.B60. In that suit, a specific issue was framed on the contention putforth by the first defendant that the will was not true or genuine. The issue framed reads as follows: " Whether the Will alleged to have been executed by Chinnammal in favour of the first defendant(fourth defendant herein) on 15.11.62 is true, valid and was executed while she was in a sound and disposing state of mind?". In that case, sufficient opportunites were given to all the parties to let in evidence. The judgement of the trial Court made in O.S.993/69 was marked as Ex.A9. A perual of the judgment would clearly reveal that the said Court had expatiated the entire evidence including that of the contesting witness and found that the Will was true and valid and acted upon also. It is to be noted that the very same defence was taken out by the first defendant herein which was already taken in the earlier proceedings. Hence, it would be quite evident that the first defendant has questioned the truth and validity of Ex.A4 Will and has reiterated the very same defence in this case in which he has already failed. From the judgement of O.S.No.993/69 an appeal has been preferred and the appeal was also dismissed. Under such circumstances, the finding of the Court in respect of the Will would be binding on

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

the first defendant who took a defence against the execution of the will and failed. Now, it would be leading to reiteration of the same defence.

15. Further, in the instant case, the contention of the respondents that the Will was neither produced nor proved has to be discountenaced for the simple reason that the plaintiff has taken serious attempt to sent for the document namely, the original Will from the other proceedings, but the same was returned as the original will was destroyed. Now, the point is whether the Will which was executed by Chinnammal in favour of the 4th defendant on 15.11.1962 is the subject matter between the same parties, who are members of the joint family and found to be true. No question of re-adjudication and giving a different finding would arise because, originally, in O.S.993/69 the same issue was framed and decided that the will was genuine and hence, the same has become final. Thus, the Court has to accept the finding of the trial Court that the Will was acted upon. Further, if Chinnammal had transferable right in the suit property in respect of which she executed the Will on 15.11.1962 as found in Ex.A4, the property should come automatically to the hands of the fourth defendant on the death of Chinnamma and hence, the fourth defendant in turn has executed four sale deeds in question. Under such circumstances, the attempts made by the first defendant to defeat the rights of Chinnammal in a different way failed. Now, he has taken a stand in the instant suit as he is the foster son of Muthulinga Padaiyachi and on his death the property was enjoyed by all in the joint family and on the death of Chinnammal, the property came to his hands. The court is of the opinion that the very defence pleaded would be nothing but improper and unacceptable because a feable attempt was made to get the property if possible.

16. The further contention made by the first respondent's side that he has been in possession of the property by adverse possession cannot be accepted since the trial Court, marshalling the evidence proper has rejected the ownership of the first defendant. In the instant case, a feable attempt was made by the first defendant pleading adverse possession and nothing has been broughtforth to accept the said adverse possession because it was not a case at all at any point of time. Originally, he has claimed ownership of the property as the member of joint family and hence, adverse possession at no stretch of imagination could be accepted. Hence, it has got to be rejected. Under such circumstances, the first appellate forum without proper perspective of evidence has set aside the judgment of the trial Court and it has to be pointed out that the First Appellate Court has given a finding that the Will is not proved forgetting the facts that the matter has already been decided in the earlier suit between the same parties and the same has become final and the original will which was the subject matter has been destroyed. It is not the case where the parties were relying on the Will but were relying on the sale deeds executed by the fourth defendant. So far as the fourth defendant is concerned, he derived title

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

through the Will in question and the Will has been proved in the earlier proceedings adjudicated between the same parties and it is not the main issue but a subsidiary issue.

17. Under such circumstances, the Court is of the considered view that the appeals have got to be allowed. Hence, the judgement of the first appellant Court is set aside and the judgment made by the trial Court is restored. The Second Appeals are allowed. No costs.

Vsi

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Additional Sub-Judge,Cuddalore.
2. The District Munsif Court, Panruti.
3. The Record Keeper, V.R.Section, High Court, Madras.

3 cc To Mr.G.Kathirvelu, Advocate SR Nos.39095,39094 & 39096.
3 cc To M/S.G.R.Associates Advocate SR Nos.39072,39073 & 39074.

PV(CO)
RVL 26.09.05

S.A. Nos.365 to 367 of 1994

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/